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*Attorneys for Defendants Kyle R. Scott, Richard
K. Murray, Axcent, LLC, and Endeavor 4, LLC*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Customers Bank,
Plaintiff,

vs.

Endeavor 1, LLC ; Endeavor AL,
LLC ; Axcent LLC ; Endeavor 2,
LLC ; Endeavor 3, LLC ; Endeavor
4, LLC ; Endeavor Development,
LLC ; Oceanus, Inc. ; Richard K
Murray ; Kyle R Scott ; Xilin Ding ;
Yang Shao,
Defendants.

Case No. 2:23-cv-00374-DWL

MOTION FOR REMAND

(Assigned to Hon. Dominic W. Lanza)

Defendants Kyle R. Scott, Axcent, LLC, and Endeavor 4, LLC (the “Scott Defendants”) hereby object to the removal of the above-entitled action to the United States District Court for the District of Arizona and respectfully requests that this Court remand this action to the Arizona Superior Court in and for the County of Maricopa (the “Superior Court”) and award their attorneys’ fees and costs pursuant to 28 U.S.C. § 1447(c).

Removal is appropriate because: (1) the Scott Defendants do not consent to removal, and removal requires the “unanimous consent” of defendants; (2) Defendant Yang Shao did not

1 obtain the consent of all then-served defendants prior to filing her Notice of Removal (“Notice”);
 2 and (3) removal of this action violates the Forum Defendant Rule.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Factual and Procedural Background**

5 On January 17, 2023, Customer’s Bank, a Pennsylvania corporation, filed this action in
 6 the Superior Court. (*See* Doc. 1-4). Defendants Endeavor 1, LLC; Endeavor AL, LLC; Endeavor
 7 2, LLC; Endeavor 3, LLC; Endeavor 4, LLC; Endeavor Development, LLC; Kyle R. Scott, and
 8 Richard K. Murray are all citizens of Arizona. (Doc. 1 at ¶¶ 3–9, 11–12).

9 Defendant Richard K. Murray was served in this action on February 6, 2023. (Doc. 1-6);
 10 (*see also* Declaration of Richard K. Murray [hereinafter “Declaration”], attached hereto as
 11 **Exhibit A**, at ¶ 4). Plaintiff filed the Affidavit of Service on February 23, 2023. *See* Ex. B.

12 On February 27, 2023, Defendant Yang Shao filed the Notice in this Court, citing diversity
 13 of citizenship as the sole basis of jurisdiction. (Doc. 1 at Section B) (citing 28 U.S.C. §
 14 1332(a)(3)). The coversheet filed with the Notice identified that both Defendant Yang and
 15 Murray had been served on February 6, 2023, and included a copy of the affidavit of service of
 16 Murray. (*See* Doc 1-2 at ¶ 4 and Doc. 1-6).

17 Although the Notice acknowledged that Murray had been served, Yang did not ask
 18 Murray whether he would consent to removal before filing the Notice. Ex. A at ¶ 5.

19 Counsel for the Scott Defendants accepted service of the pleadings on their behalf on April
 20 6, 2023.

21 **II. Legal Argument**

22 There is a “strong presumption” against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d
 23 564, 566 (9th Cir. 1992). This Court should remand this action to the Superior Court for three
 24 reasons: (1) all the defendants in this action do not unanimously consent to removal; (2) the
 25 Notice is improper as it lacks unanimous consent of all served defendants at the time of filing;
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1 and (3) removal violates the Forum Defendant Rule.¹

2 First, the Scott Defendants hereby object to removal. Any defendant may remove an action
3 from state court to the federal court “embracing” the state court in which the action is pending,
4 so long as all defendants unanimously consent to the removal. 28 U.S.C. §§ 1441, 1446(b)(2)(A).
5 A defendant who is served following removal of an action to federal court has the right to move
6 to remand the action to state court after making his appearance in the action. 28 U.S.C. § 1448;
7 *Deversey, Inc. v. Maxwell*, 798 F. Supp. 2d 1004, 1007 (E.D. Wis. 2011).

8 The Scott Defendants, who were served after Yang filed her Notice, hereby objects to
9 removal of this action. Because the Scott Defendants object to removal, the necessary
10 “unanimous consent” requirement for removal fails.

11 Second, Yang’s Notice was improper when filed because she did not obtain the consent
12 of all then-served defendants. Under 28 U.S.C. § 1446(b)(2)(A), removal requires the unanimous
13 consent of all defendants who have been properly joined and served in the action. At the time the
14 Notice was filed, Defendant Murray had been properly served. Yang did not obtain Murray’s
15 consent to remove the case to federal court prior to filing the Notice. Nor does the Notice make
16 any mention of obtaining consent, or attempts to obtain consent, from Murray, despite
17 acknowledgement in the Notice and its exhibits that Murray had been served. The Notice is
18 therefore improper, and the case should be remanded.

19 Finally, removal is improper in this instance because it violates the Forum Defendant Rule.
20 Under the Forum Defendant Rule, a case may not be removed to federal court on the basis of
21 diversity jurisdiction if any defendant in the action is a citizen of the state in which the case was
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25 ¹ The Notice is also procedurally deficient because it does not contain an “affirmative statement
26 that a copy of the notice has been filed with the clerk of the state court from which the action or
27 prosecution has been removed.” See LR Civ 3.6(a). Defendant Yang did not file a copy of the
28 Notice in the Superior Court until March 20, 2023. See The Judicial Branch of Arizona, Maricopa
County “Civil Court Information – Case History” available at
<http://www.superiorcourt.maricopa.gov/docket/civilcourtcases/caseInfo.asp?caseNumber=CV2023-000859>.

1 initially filed. 28 U.S.C. § 1441(b)(2) (“A civil action otherwise removable solely on the basis of
2 the jurisdiction under section 1332(a) of this title may not be removed if *any* of the parties in
3 interest properly joined and served as defendants is a citizen of the State in which such action is
4 brought.”) (emphasis added).

5 Here, Shao removed this case from the Arizona Superior Court to the Arizona District
6 Court on the basis of diversity jurisdiction under 28 U.S.C. § 1332. However, at least Endeavor
7 2, LLC, Endeavor 3, LLC, Endeavor 4, LLC, Endeavor Development, LLC, Kyle R. Scott, and
8 Richard K. Murray are residents and citizens of Arizona. Therefore, multiple defendants who are
9 parties to this action are citizens of the state in which this action was initially filed, and removal
10 is barred by the Forum Defendant Rule.

11 This Court has the authority to “require payment of just costs and any actual expenses,
12 including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). As stated by
13 the U.S. Supreme Court, the “standard for awarding fees should turn on the reasonableness of the
14 removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). “Absent unusual
15 circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party
16 lacked an objectively reasonable basis for seeking removal.” *Id.*

17 This Court has found that a defendant lacks an objectively reasonable basis for removal
18 efforts when the removing party’s position is directly foreclosed by its own briefing. *See*
19 *Christian Relief Servs. Charities Inc. v. Silktree Investments LLC*, 2019 WL 927026 *3–4 (D.
20 Ariz. Feb. 26, 2019) (awarding attorneys’ fees and costs where the defendant’s briefing cited
21 cases that confirmed removal was inappropriate).

22 Here, Yang’s filing of the Notice is objectively unreasonable because the Notice itself is
23 patently defective, and a cursory review of the statute’s removal requirements would have made
24 this obvious. The Notice confirms that at the time it was filed, Defendant Yang was aware Murray
25 had been served. Yet no efforts were made to seek his consent, or even acknowledge the basic
26 requirements of the removal statute that all served defendants consent to removal. Further, the
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1 Notice acknowledges that seven of the named defendants are Arizona residents, including the
2 already-served Murray, in violation of the Forum Defendant Rule of the removal statute.

3 Because Yang supported her request for removal with information that unquestionably
4 demonstrated removal was inappropriate under the statutes, her removal request is objectively
5 unreasonable. The Scott Defendants request that this Court award their attorneys' fees and costs,
6 and that this Court retain jurisdiction to consider any award of attorneys' fees and costs. *Id.*

7 **III. Conclusion**

8 For the foregoing reasons, the Scott Defendants respectfully request that this Court remand
9 this action to the Superior Court of Arizona and award them their attorneys' fees and costs.
10

11 RESPECTFULLY SUBMITTED this 10th day of April, 2023.

12 **MAY, POTENZA, BARAN & GILLESPIE, P.C.**

13
14 By: s/Andrew S. Lishko

15 Andrew S. Lishko, Esq.

16 Danika Marzillier, Esq.

17 *Attorneys for Defendants*
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants:

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I transmitted a copy via U.S. Mail to:

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/s/ Elena Cordero